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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Carriage of the Transmissions	)	
of Digital Television Broadcast Stations	)	**CS Docket No. 98-120**
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

COMMENTS OF ENCORE MEDIA GROUP LLC

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October 13, 1998

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COMMENTS OF ENCORE MEDIA GROUP LLC

Encore Media Group LLC ("EMG") submits these comments in response to the Commission's Notice of Proposed Rule Making, FCC 98-153, released July 10, 1998 ("NPRM"), in this proceeding. The NPRM seeks comment on whether the Commission should adopt rules expanding the must carry obligations imposed on cable systems throughout the country with respect to the transition period from analog to digital broadcasting.

EMG is one of the largest providers of programming networks to multichannel video distributors, including cable, DBS, wireless cable, TVRO, and SMATV operators. EMG provides the following channels of commercial-free video programming services to multichannel video programming distributors (MVPDs):

> "ENCORE," consisting primarily of movies that first were released in the 1960s, 1970s, 1980s, and 1990s;
>
> "STARZ!," which features, in addition to ENCORE titles, exclusive first-run, uncut feature films from studios such as Universal Pictures, Touchstone Pictures, Hollywood Pictures, New Line Cinema, Miramax Films, Fine Line features, and other studios and distributors; and
>
> "STARZ!^{2}," which is an alternative format of STARZ!, featuring a double feature of first run films in prime time each night of the week.

ENCORE's "Thematic Multiplex Channels," comprised of six separate channels each with a common subject theme: Love Stories, Westerns, Mystery, Action, True Stories, and WAM! America's Kidz Network;

"MOVIE*plex*," consisting of alternating days of ENCORE and each of the Thematic Multiplex Channels in a single channel;

"BET Movies/STARZ!^{3}" is the first and only movie channel featuring exclusively first run theatrical releases, recent popular titles, classic movies, and independent films directed by or starring African-American artists.

EMG also provides several additional feeds of these channels. With the exception of Thematic Multiplex Channel WAM! America's Kidz Network, all of EMG's current channels share a primary focus on theatrically-released feature films for the great preponderance of their programming. WAM! America's Kidz Network's schedule includes several hours of children's instructional educational programming each day, as well as several hours of entertainment and informational series aimed at the target audience of 8 to 16 year olds. Otherwise, the focus of EMG's channels is theatrical feature films produced by major and minor American and international film studios.

EMG's program networks are largely upstarts fighting competitively for carriage on cable television systems and other MVPDs. The Encore channel first signed on in 1991, while EMG's first run movie channel STARZ! and the six Thematic Multiplex Channels were launched only in 1994. STARZ!^{2} was launched in 1996, and BET Movies/STARZ!^{3} was launched in 1997. STARZ!, STARZ!^{2}, and Encore compete directly with HBO and Cinemax (owned by Time Warner Communications), and Showtime and The Movie Channel (owned by Viacom International), premium movie channels that have been carried on cable systems around the country for over twenty years each. But in order to compete with these entrenched premium movie channels for subscribers, EMG must first convince the local cable operators to launch STARZ!, STARZ![2], and Encore on their cable systems. While EMG has met with extraordinary success in the marketplace once its premium channels have been launched on cable systems, often cable operators hesitate to launch the channels due to severe channel capacity limitations on their cable systems across the country.

It is in this context that EMG addresses the Notice of Proposed Rule Making now before the Commission. The Commission's recently adopted digital broadcast television ("DTV") rules provide for a transitional process for the conversion of television broadcasting from an analog to a digital form of transmission. The DTV rules make all existing analog television licensees eligible to apply for a new digital station using 6 MHZ of spectrum in a different band from their existing 6 MHZ spectrum licenses. DTV licensees will be allowed under the new rules to broadcast in a high definition mode, in a multiple channel standard definition mode, or in a combination of both. The DTV rules provide for a transitional period which will run through 2006, during which each station launching DTV will broadcast both analog and digital signals. The first digital signals in the largest television markets will be launched in the latter part of 1998.

The NPRM poses for comment essentially seven must carry options for the transitional period. These options range from no must carry obligations for the digital broadcast signals, to deferral of digital must carry obligations to a specified date, to a penetration-based requirement, to a phase-in of digital must carry with some immediate carriage, to immediate full concurrent digital and analog carriage of broadcast signals up to one third of cable system capacity.

EMG strongly opposes any added must carry obligation with respect to digital broadcast signals during the transition period. An increased must carry requirement would be devastating to other video programming networks, especially new networks, which, without any artificial boost from governmental edict, would compete with these digital television broadcast signals. Such an artificial competitive boost for DTV signals is all the more inappropriate in view of the fact that *virtually no one can see the DTV signals because no one has a television set which can receive them.*

Channel capacity is a most precious commodity on all cable systems, which is true even the most sophisticated, rebuilt and expanded systems. A non-rebuilt cable system generally has an average capacity of less than 350 MHZ, which allows for 45-50 analog channels. Typically, when a system is rebuilt to 750 MHZ, the system will cap its analog usage at 550 MHZ, which equates to an increase to about 70 analog channels. Of the remaining added capacity, 100-125 MHZ is typically used for digital video, and the remaining 75-100 MHZ is reserved for data, internet, telephony, and interactive applications. The 100-125 MHZ digital video spectrum would translate into approximately 100-150 digital channels at 10 or 12 to 1 compression, of which 40-50 channels might be reserved for pay-per-view and another 10 channels reserved for multiplexed screens of premium channels.

For the majority of traditional cable systems which are not quickly being rebuilt, the typical analog channel capacity of 45-50 channels, or even of 70 analog channels where the system is rebuilt to 550 MHZ, makes for a highly competitive environment for launching new programming networks. Yet since 1993, the number of cable networks competing for such extremely limited channel space has increased from 101 to more than 225, which is far faster growth than analog channel capacity can support.

It is clear that even for those cable systems expanding to 750 MHZ with an offering of digital service to subscribers, such expanded capacity is no panacea of carriage for the rapidly growing number of competing program networks in addition to analog and digital local broadcast signals. If DTV signals were required to be carried on analog cable channels during the transition period, there will still be the same vicious competition for the 70 or so analog channels even on a digital cable system. In order for new cable networks generally to be able to compete with entrenched cable networks, analog carriage is essential. Due to the fact that only a limited portion of a digital cable system's subscribers will actually obtain digital set top converters necessary for reception of digital service over the next decade, relegation to digital carriage alone will seriously hurt the viability of such new networks. If a new network is launched on a digital channel on a digital system, it is initially limited to the digital penetration of the system, which in practice and projection cannot reasonably be expected to be more than 15-20% through most of the DTV transition period. For these digital cable systems, the analog channels will remain the primary way to reach the remaining 80-85%. Especially for advertiser supported services, maximum viewer reach of 20% of the cable universe means the service is dead on arrival as a viable competitor.

All of which is why there is now such cut throat competition among new networks for the remaining analog channel capacity. New networks are routinely *paying* cable systems several dollars per basic subscriber in a bidding war for such critical few remaining analog channels. Regardless of whether this "payment for launch" structure is ideal for consumers, it establishes something of a market value for analog carriage on cable systems. Yet the obvious question is, why should television broadcasters, who have already been given their DTV spectrum essentially for free, also be ordained by the Commission to receive free mandatory carriage of their DTV signals on all cable systems? For example, a new advertiser-supported cable network may be forced to pay $5 per basic subscriber for carriage before 50 million basic subscribers, a total expenditure of $250,000,000. Extending must carry for 4-6 DTV signals per market during the transition period raises the specter of yet another billion dollar giveaway to broadcast stations, over and above the multi-billion dollar giveaway of the digital spectrum itself.

Nor does an added DTV signal must carry requirement merely mean that some new cable networks may never get launched. Cable systems with 45 channels or 70 channels or 90 channels do not simply have "empty" channels that can accommodate new DTV signal carriage requirements during the transition period without displacement of existing channels. Cable systems are full. In order for systems to add DTV signals, existing networks will have to be dropped.

Moreover, a carriage preference for the broadcasters' duplicative DTV signals cannot rationally be justified from either a First Amendment or a public policy standpoint. As a public policy matter, the breadth and diversity of subject matter covered by those more than 225 video programming networks far outstrips the "least common denominator" programming pursued by most over the air television broadcast stations. But even such rational public policy concerns are out of place in this critical First Amendment arena. Any preference of broadcaster signals over programming networks by the Commission, mandated by expanded must carry requirements, will violate First Amendment constraints.

For these reasons, EMG urges the Commission to refrain from increasing the must carry burden imposed on cable systems If the DTV signals are valuable to cable systems' subscribers, cable systems will carry them. The marketplace is the proper and appropriate means of deciding whether a DTV signal should be carried..

Respectfully submitted,

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